No. 7170

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSE MAYOLA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

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Statement of the Case.

Appellant's statement of the indictment, parties, and of the result of trial, is correct. The facts, as appellee views them, are as follows: It is undisputed that three men, Walkup (deceased prior to trial), Armstrong and Campbell, entered into the conspiracy charged; that they got together the necessary paraphernalia for counterfeiting; installed it in the Walkup home; made the plates or films described in the indictment; made the counterfeit money and formed the design to dispose of it in some South or Central American country. In carrying out this design Walkup on April 9, 1932, sailed for Panama

with the counterfeit money in his possession. He returned to San Francisco, stated that the deal had fallen through, and in the presence of his wife, burned the remaining bills. In the meantime the plant had been dismantled and moved to the Walkup office and the films and plates concealed in the Walkup home. Walkup, and shortly thereafter Armstrong, were taken into custody and questioned. Walkup later made on June 30, 1932, one statement, and on additional examination made on July 1, 1932, another, both in writing. Subsequently appellant and Campbell were arrested. No part of the paraphernalia used in the counterfeiting, nor any of the plates or films were at this time found nor were their whereabouts disclosed. Later, on July 27, Walkup became a suicide. Subsequently the films were found in his home hidden under the carpet and the paraphernalia used in the counterfeiting was found at his place of business.

The following facts show appellant's knowledge of, and participation in the conspiracy charged:

His home during this time was next door to the Walkup home. He was acquainted with Walkup and was in June or July of 1931 introduced by the latter to Campbell. On April 7, 1932, he gave or loaned Walkup $500.00. On April 8, 1932, he went to Walkup's home and met and was introduced to Armstrong. The three were together in the back room where the paraphernalia of the counterfeiting was installed; twelve hundred and sixty of the bills, arranged for drying, were in the room; the press was

not dismantled. Walkup said "Well the job is finished, now let's have a drink". They had a drink. Walkup took appellant by the coat, turned him around, picked up some of the counterfeits, and with them and a genuine bill in his hands, showed them to appellant and said, "What do you think of these? How do they look to you? Appellant replied, "I can't tell a good one from a bad one, they all look alike to me." Prior to this conversation and the loan of $500.00 to Walkup, appellant had purchased a ticket to Panama for himself and had made a reservation for Walkup. Walkup divided the money received with Armstrong, stating he received it from Mayola for the expenses of the trip. Walkup and appellant sailed for Panama together, Walkup carrying the counterfeit money, they both occupying the same stateroom. While in Panama Walkup lived with appellant and introduced him to various people.

Brief of Argument.

Appellee, answering the points raised by appellant in the order in which they occur, proposes to establish the following propositions:

(1) The defendant was accorded a fair and impartial trial. Pages 6 to 10 this brief—answering pages 6 to 27 appellant's brief.

(2) The testimony of the witness Armstrong as to conversations with a co-conspirator relating to the defendant, was properly received. Appellant's assignments of error I, II and III are without merit. Pages 10 to 13, this brief—answering pages 27 to 35 appellant's brief.

(3) The testimony of the witness Helen Walkup was properly received. Appellant's assignments of error IV to IX inclusive, are without merit. Pages 13 to 17 this brief—answering pages 36 to 57 appellant's brief.

(4) The witness Helen Walkup was competent to testify in the case although her deceased husband had been a member of the conspiracy. Pages 17 to 18 this brief—answering pages 58 to 59 appellant's brief.

(5) The admission of the written statement of the deceased conspirator Walkup was, if error, one which crept into the case through the door opened by appellant's counsel. Appellant's assignment of error X is accordingly without merit. Pages 18 to 20, this brief—answering pages 59 to 61 appellant's brief.

(6) The portion of the court's instruction complained of, referring to proof of conspiracy by circumstantial evidence, is, when read in connection with the rest of the instruction, and with the other instructions given, a correct statement of the law. The alleged error now complained of was never called to the trial court's attention by proper or any exception. Pages 20 to 21 this brief—answering pages 61 to 78 appellant's brief.

(7) The record contains sufficient evidence to sustain the verdict, but the state of the record does not warrant a review of the facts by this court. Pages 21 to 23 this brief—answering pages 78 to end appellant's brief.

Foreword.

For the most part appellant's brief is made up of argument and authority supporting attempted assignment of errors outside the record. Points 1, 4, 6, and 7, of this brief are devoted to answering such contentions. Only three of the eleven headings under which appellant has arranged his argument and authorities are addressed to assignments of error based on exceptions taken to the rulings of the lower court.

We do not, by answering contentions thus irregularly before this court, wish to be understood as admitting that the matters so complained of, fall within the letter or spirit of paragraph 4 of Rule 24 of this court. On the contrary we contend that the alleged errors so sought to be brought before this court are

all matters which, had they been properly called to the attention of the trial court, could and would have been remedied.

The situation is not one where appellant seeks to assign as error admissions of evidence, over objection, to which no formal exception was taken. There was not one instance in any of the ~~eight~~ groupings of alleged error mentioned above, where appellant's counsel gave to the trial court, or to appellee, even the slightest intimation by objection or otherwise that he considered the matters, now attempted to be assigned as error, objectionable.

Argument.

I

Under the general contention that appellant did have a fair trial are grouped four unrelated, alleged errors, none of which were suggested on the trial.

(a) Appellant's contention that his cross-examination by the trial Judge was so searching, partial and long drawn out as to amount to denial of a fair trial (pp. 6-15 appellant's brief) is best answered by the questions *and the answers.* (Tr. pages 48 to 62 incl.).

None of the cases cited by appellant for this point touch on the matter of alleged biased cross-examination; all deal with the entirely different matter of judicial comment on the evidence. We submit that this case comes squarely within the rule and spirit

of this court's decision in *Kettenbach v. U. S.*, 202 Fed. 377 at 385:

> "The trial judge in a federal court is not a mere presiding officer. * * * He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. In the case at bar there was no such expression of opinion by the court, and there is nothing in the record which is before us to indicate or to give the jury the impression that the judge was in any degree partial or biased or prejudiced against the plaintiffs in error."

(b) The attempt now to assign as error certain remarks said to have been made by the District Attorney in his argument (p. 16 app. brief) fails by its statement. Appellant admits that no objection was made to the remarks and that the jury was fairly and correctly instructed on the subject to which the remarks were addressed. As there is no record of the alleged remarks we must leave this particular contention to refute itself.

(c) With respect to the attempted assignment of error predicated on the District Attorney's examination of the witness Dineen (p. 17 App. Brief); it appears sufficient to point out that no objection was raised, no exception taken, nor was any motion regarding the evidence made. The error, if any, was surely as apparent at the time of trial as it now is.

(d) The attempted assignment of error based on a portion of the trial court's instruction on the matter of conspiracy is, we submit, not only without merit but in addition, is unfair. It is without merit because the instruction from which the excerpt is taken, if read as a whole, correctly states the law relative to the necessity of proof beyond a reasonable doubt.

Immediately before the challenged portion of the instruction was given, the court had instructed the jury as follows:

> "Each of these elements is an essential element of the crime charged and must be established to your satisfaction and beyond a reasonable doubt before you can find a verdict of guilty. If these three elements are established, then the crime of conspiracy is complete, regardless of whether the purpose was accomplished or not." (Tr. p. 68)

Later in the same instruction the point was again stressed:

> "No defendant can be convicted of conspiracy merely because of his acquaintance or association with some or all of the conspirators, unless you are satisfied beyond a reasonable doubt that all such defendants had guilty knowledge of and were participants in the conspiracy. Each defendant is entitled to an individual and separate consideration at your hands as to his guilt or innocence." (Tr. p. 72)

Furthermore, the court gave (Tr. p. 66) its general instruction covering the subject.

The unfairness of this method of assigning as error an instruction to which no exception was taken is evident. The rest of the instruction shows clearly that the court had in mind the principle involved and would on proper application have remedied the matter here complained of had it needed remedy.

(e) The final point urged by appellant seems to be that in cases such as this, where there has been an acquittal on counts charging substantive offences and a conviction on the accompanying conspiracy charge, such fact warrants scrutiny of the record by the appellate court, and justifies the consideration by this court of the alleged errors now attempted to be assigned, although the condition of the record does not require their consideration.

None of the cases cited by counsel are authority for the proposition stated. They all refer to a conviction without sufficient evidence to support it, rather than to the matters here sought to be urged.

For authority dealing directly with the sort of situation here presented we quote Justice Rudkin's concurring opinion in a case where the rest of the court had reviewed both the evidence and alleged errors although there had been no objections or exceptions:

> "I concur in the judgment, but am opposed to the practice of discussing or considering questions not properly before us, because the inevitable tendency is to encourage loose practice, mislead the bar, and embarrass the court in the future. The court should, therefore, refuse to

consider the sufficiency of the evidence to sustain the verdict for the reasons stated by this court in Bilboa v. United States (C.C.A.), 287 Fed. 125, decided February 26, 1923."

Traversi v. U. S., 288 Fed. 375 at 376.

II

Beginning at page 27 of his brief appellant groups together his assignments of error I, II and III for what he terms the purpose of brevity. He however overlooks the fact that each of the assignments of error relates to a ruling of the court upon a separate objection and that each assignment of error must accordingly be considered separately.

Assignment of error I was from the court's ruling on appellant's objection to the following question:

> "Q. Do you recall a conversation with Mr. Walkup and Mr. Mayola in April, 1932, concerning the payment for the expenses of the trip to South America?
>
> "Counsel for defendant Mayola objected to the question as leading and suggestive, and, further, that Mr. Mayola had not been connected with the conspiracy."

The question called for a conversation had between the witness, a confessed conspirator, with the accused and another confessed conspirator. The objection was to the form of the question, not to the admissibility of the evidence called for. The question was leading and suggestive but it is a well settled canon of the

law of evidence that such objections are addressed to the sound discretion of the court.

The question called for a conversation in the presence of the accused, which the government clearly had a right to elicit. If the answer was objectionable, proper and timely motion to strike should have been made.

The statement "and, further, that Mr. Mayola had not been connected with the conspiracy" is not an objection. It is merely a statement of counsel's opinion of the state of the evidence. If considered as an objection, and properly placed before the court as such, it would fall within the rule announced in *Doyle v. United States,* 169 Fed. 625, at 627:

> "If it was intended by the objection just mentioned to insist that Doyle's connection with the scheme should be first shown, there are two answers: First, that enough had already been proven to warrant the belief that Doyle was involved in the scheme; and, secondly, there is no hard and fast rule that the evidence of concert should be first put in. The substance of the rule is that the jury must be satisfied that the concert existed before they can consider what one of the parties did or said in carrying out the joint purpose. In overruling the objection, the court very properly instructed the jury as to what the rule is. Besides, the order of production of evidence is one largely in the discretion of the court."

Assignment of error II relates to the court's admission, over the objection that the question calls for

hearsay, of a conversation between the witness, Walkup (a deceased conspirator), and one Johnson. Evidence had already been admitted showing that Walkup, Armstrong and Campbell had been acting in concert to prepare to, and to counterfeit Colombian money in violation of the laws of the United States. The paraphernalia afterwards used in this conspiracy was acquired in the execution of the plan to counterfeit Colombian money. When that conspiracy merged into the instant one, is not clear. The evidence elicited however dealt with a time before any criminal intent was manifested in that transaction. It referred to a time during Walkup's negotiations with Armstrong and Johnson before his criminal plan had been divulged to them. Accordingly the error in its admission, if any, could hardly have been prejudicial to the defendant as the conversation did not of itself impute to him any criminal intent or design. As this same matter was later referred to similar testimony from witness Helen Walkup, without objection from appellant's counsel, its retention here can hardly be error. (Tr. pp. 24, 25). Redirect Examination of witness Helen Walkup.

Assignment of error III relates to the following question and objection:

> "Q. What was the approximate date of the first conversation?
>
> "Mr. Tramutolo objected to the question upon the ground that the question called for hearsay."

It is obvious that the question does not call for hearsay; that the objection was accordingly improp-

erly taken, and properly overruled. The witnesses' answer was hearsay, and, if inadmissible under the state of the record at that time, was subject to motion to strike. As counsel interposed no such motion, the statement is in the record without proper or any objection to its inclusion.

III

Appellant again groups his assignments of error IV to IX under one heading and argues as to each assignment the same point.

Assignment VII (Tr. p. 80) is from the ruling of the trial court overruling the objection that the question was leading and suggestive. That error assigned on a ruling to this form of objection, is not ordinarily held to be prejudicial, has already been suggested (p. 10 supra).

Assignment VIII is from the ruling of the trial court overruling the objection that "this conspiracy terminated after the money was made" (Tr. p. 81).

In view of the indictment which in part charges that defendants "did unlawfully conspire to * * * and to keep in their possession and conceal, with intent to defraud, said falsely made * * * counterfeited obligation * * *" (Tr. p. 2); such assignment of error is without merit.

Appellant's objection to the reception of the evidence covered by assignments IV, V, VI and IX is

that such evidence was hearsay and as such inadmissible.

It is admitted that the statements in each case were made during the existence of the conspiracy by one of the conspirators and that at the time of their reception in evidence the conspiracy had been proven.

Appellant quotes from several cases dealing with the question of hearsay evidence in general. With those views we are in accord, but contend that the declarations here under consideration are admissible since they are declarations of a conspirator made during the life of the conspiracy and form part of the res gestae of acts designed to advance the conspiracy.

The first of the declarations (Assignment IV, Tr. p. 78) concerned a declaration of Walkup made after his return from appellant's home. Walkup stated that appellant had told him the best place to carry the counterfeit bills was under his clothes. The statement relates to and explains an act subsequently done in carrying out the purposes of the conspiracy, the making and the wearing of the belt in which Walkup subsequently carried the counterfeit to Colombia. It is as much a part of the immediate preparation for the act of carrying the counterfeit as was the subsequent making and donning of the belt.

Assignment V (Tr. p. 79) relates to a declaration made by Walkup stating that he got the money for the trip to Colombia from appellant. This declaration also

relates to and explains the loan which was a means used to realize the object of the conspiracy. It also corresponds with the declaration Walkup made to the witness Armstrong and is thus corroborative of, and explanatory to, a fact already in evidence.

Under Assignment VI (Tr. p. 79) comes the declaration of Walkup that the belt in which the witness subsequently saw the counterfeit packed was made by appellant's wife. It explains the source of an instrumentality used in effectuating the concealment of the bills. This belt had already been described by the witness and had been made the night before Walkup sailed. (Tr. p. 22). This declaration was almost contemporaneous in time with the appearance of the belt. It was as much a circumstance attending the appearance of the belt as was Walkup's act in putting it on, and is equally proper for the jury's consideration.

As counsel's next Assignment of Error numbered VII does not call to this court's attention a proper basis for a finding of prejudicial error, the answer elicited was properly before the jury. That answer is "Around in March Mr. Walkup told me Mr. Mayola might take him to South America with him to dispose of the money." (Tr. p. 80).

As the objection on which Assignment VIII is based is without merit, the witness' answer "He said Mr. Mayola knew someone in South America who could handle it" (Tr. p. 81) was properly received in evidence.

Viewed in the light of these two statements, the answer referred to in Assignment IX "He told me that Mr. Mayola introduced him to two men, Sisto Posso and Senior Ibanez, in South America, who wanted to handle the money if it was good," is evidently an explanation of a verbal act (the previous declarations) already before the jury without exception.

We are convinced that the declarations just reviewed were properly received as declarations of a conspirator made during the life of the conspiracy; contemporaneous with and attending acts done in furtherance of the conspiracy. They were all made at a time and under circumstances which make it clear that they were undesigned. They were all incidental to the overt acts which they accompanied and described. We believe all of the declarations, referring as they all did to the manner and method of carrying on the conspiracy, may be properly termed a part of the res gestae of acts done in furtherance of the conspiracy.

In the case of *Jones v. United States,* 179 Fed. 584 at 601, this court said, concerning a declaration of one conspirator made while the conspiracy was in progress and related to the conspiracy *but not in its furtherance*:

> "In the present case the statement was made while the conspiracy was in progress, related to the object of the conspiracy and was therefore part of the res gestae."

The following cases are there cited to the same effect:

United States v. Gooding, 12 Wheat 460, 469;
American Fur Co. v. U. S., 2 Peters 358, 364;
Nudd v. Barrows, 91 U. S. 426, 438;
St. Clair v. U. S., 154 U. S. 134, 149;
Wibory v. U. S., 153 U. S. 632, 657.

In the Wiborg case, supra, the trial court had received in evidence over objection, declarations of some of the conspirators as to the object of the proposed landing in Cuba. These declarations were made out of the presence of the accused, by conspirators who were not indicted, and were obviously *not in furtherance of the conspiracy.* In holding such declarations properly admitted, the court said:

> "The declarations must be made in furtherance of a common object, or must constitute a part of the res gestae of acts done in such furtherance."

IV

Appellant contends that Helen Walkup would have been incompetent to testify in the case if her husband, who was a conspirator, had lived, and that she was consequently incompetent to testify although he died and was accordingly not a party to the record. The statement refutes itself.

This attempted assignment is again without support of objection addressed to the point sought to be raised.

In *Knoell v. U. S.,* 239 Fed., 16, 22 to 26, the court discusses the question, and decides adversely to appellant's contention. At page 25 the court says:

> "Public policy ceases to apply where the husband has become his own accuser and formally confessed the crime. The policy rests on the implication that the husband has or may have a guilty secret and (either in fact or presumptively) is anxious to conceal it. His wife therefore will become his antagonist or will bring reproach on his memory if she tells what she knows, and for this reason her mouth must be closed. But, if he himself has told the story and has made a formal confession in court, the reason disappears, and in such a situation we can see no ground for holding that she may not repeat what her husband has already proclaimed to the world."

V

The admission of the next evidence of which appellant complains and which we shall now consider, was, if error, one to which he was a party.

Walkup made two statements in writing, one on June 30 exculpating appellant and another on July 1, which incriminated him. Both were produced in court by a witness who identified them. Appellant's counsel desired to read a part of the first statement. The record then shows (Tr. p. 30):

> "Mr. TRAMUTOLO: I ask to read that portion your Honor.
>
> The COURT: Very well, read it.

Mr. VAN DER ZEE: We object to counsel reading a part of this statement unless we are permitted to introduce the entire statement, and any other statements used, by Mr. Walkup, in the hearing.

The COURT: I will not say about that. You may indicate to the jury what it is you are reading from."

Appellant's counsel then read from the statement of June 30, the statement exculpating appellant. After certain proof (Tr. p. 31) both statements were introduced in evidence by the District Attorney, the court having overruled appellant's objection that the matter was not proper cross-examination and that the offer contained incompetent evidence.

Appellant's argument takes it for granted that the conspiracy had ended at the time these statements were made. This is not necessarily so, for although Walkup was under arrest, the paraphernalia for the manufacture of the counterfeit was still in his possession as well as the films and plates. Campbell, Mayola and Mrs. Walkup were at large. One of the unlawful objects of the conspiracy was "to have in their custody control and possession, zinc and film plates etc." (Tr. p. 2).

Whether or not the conspiracy be viewed as ended, appellant should not be permitted to urge that which is in fairness his own error. Where the accused inquires of a witness regarding, or makes statements concerning matters which are in writing, he opens the door to the writing and cannot properly object to its being received; and where, as here, he himself intro-

duces improper evidence of part of a transaction, he should not be heard to voice objection to the introduction of the remainder.

Carver v. U. S., 164 U. S. 694;
People v. Duncan, 8 Cal. A. 186;
Clayton v. State, 180 S. W. 1089.

In any case appellant could not have been materially prejudiced by the reception of this evidence, since no material fact necessary to sustain this verdict need be gotten from the statement. There is ample evidence in the record without it and its effect was at most was cumulative.

VI

The instruction next attacked by appellant in his brief (p. 61) (again without exception being taken below) is, when read in connection with the other instructions given, and with the rest of the instruction from which it has been separated, a correct statement of the law.

In addition to the references to the doctrine of reasonable doubt appearing in this same instruction, and which have been before set out (page 8 supra), there was given immediately after the partial instruction which appellant has elected to criticize, the following instruction:

> "The rule of law where the Government relies on circumstantial evidence for the conviction of a defendant is that the circumstances proven must

not only point to the defendant's guilt, but must be inconsistent with his innocence; or, otherwise stated, the circumstances proved must be such as to admit of no other reasonable interpretation or explanation than the guilt of the accused."

It is to be noted that none of the cases cited by appellant under this point criticize the instruction complained of.

Since no exception was taken, the case of *Traversi v. U. S.* (supra, page 9), will suffice as authority that appellant's attempted assignment of error is without merit.

VII

The remainder of appellant's brief, page 78 to end, is arranged under five headings, which for purposes of brevity and because the same argument in effect appears in each, we shall answer as one.

The real argument advanced by counsel is that the evidence is insufficient to sustain the verdict. The answer is two-fold:

First, That there is ample evidence to sustain the verdict;

Second, That the state of the record does not warrant this court's review of the evidence.

For the first proposition we respectfully invite the attention of the court to the brief summary of the

evidence in the statement of the case (supra pp. 2-3). The facts there stated are all from the transcript, and further are from direct evidence which is in the record without objection. That the evidence from which those facts were gathered is controverted by appellant's testimony is immaterial. The jury had the advantage of that which is not of record but is evidence of the most invaluable nature in determining a conflict of evidence; the demeanor of the witness on the stand and the manner of his testifying. The trial judge also had that advantage and consequently should have had the initial opportunity to review the evidence judicially.

This case presents, we submit, no features which should remove it from the operation of the rule requiring a motion for a directed verdict below as a prerequisite to appellate review of the evidence.

The relaxation of the rule is only in cases of plain and palpable miscarriage of justice.

Paine v. U. S., 7 Fed. (2d) 263.

No such condition exists here. We respectfully submit that for this court to review the evidence in this case, and to consider or discuss the questions improperly placed before it in appellant's brief would have, in the language of this court "the inevitable tendency * * * to encourage loose practice, mislead the bar, and embarrass the court in the future" (*Traversi v. U. S.,* supra).

The rule which this court recognizes in the following cases appears clearly applicable to the instant case:

Bilboa v. U. S., 287 Fed. 125, 126;
Clements v. U. S., 297 Fed. 206, 207;
Deupree v. U. S., 2 Fed. (2d) 44, 45, 46;
McWalters v. U. S., 6 Fed. (2d) 224, 225.

Conclusion.

We feel that appellant's argument and authorities, so far as addressed to matters properly before this court, have been both fully and fairly answered, and that the assignments of error predicated on exceptions to the rulings of the trial court have been demonstrated to be without substantial merit

As to those attempted assignments of error outside the record, we had hesitated to burden this record with argument and authority addressed to matters not properly before this court, and state now that our answer to the arguments so advanced has been dictated by our respect for the trial court and our respect for and sense of duty toward your Honors, rather than to a conviction that such answer was necessary.

We respectfully submit that the judgment of the trial court should be affirmed.

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